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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

Against

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

CHARLES R. HOLTON,
HERBERT R. TEWS,
HENRY S. GRIFFING,
JOHN A. JOHNSON,
Counsel for Petitioner.

December, 1943.

KING LAW BRIEF CO., Inc., 418 N.W. Third, Oklahoma City—Phone 3-2969

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BRIEF OF PETITIONER

This action was brought March 28, 1942, in the United States District Court for the Western District of Oklahoma, to recover the amount of taxes paid on gross insurance premiums collected in Oklahoma during 1941. Judgment for respondent was affirmed by the United

States Circuit Court of Appeals for the Tenth Circuit on May 7, 1943, in an opinion reported at 136 Fed. (2d) 44. This Court granted certiorari October 11, 1943.

JURISDICTION

Jurisdiction of this Court to review the judgment is found in Sec. 240 of the Judicial Code as amended (Tit. 28, Sec. 347, Subd. [a] U. S. C. A.); also pursuant to Rule 38, Sec. 5, Sub-section (b), Rules of the Supreme Court as amended.

STATEMENT OF THE CASE

Petitioner is a Wisconsin corporation, duly admitted and qualified to do business in Oklahoma. Respondent is a citizen of Oklahoma. The action is to recover $8,189.32 which was the amount of taxes paid to respondent under protest. In addition to alleging this diversity of citizenship and to showing the existence of the requisite jurisdictional amount, the complaint alleges that the action arises under the Fourteenth Amendment (R. 3, 5). These averments are admitted by the answer (R. 11-12).

Petitioner was originally admitted into Oklahoma to do a life insurance business on December 5, 1922, and on December 28, 1922, its license was enlarged to include the issuance of health and disability insurance. It pursued this business in Oklahoma without interruption during the intervening years and to that end procured from the state

as of March 1 in each year a renewal of its license to transact its business in the state (Complaint, R. 4; Answer, R. 11, 12).

During its years of operating in the state, petitioner entered into contracts of insurance with approximately 6,000 policyholders within Oklahoma, it employed and trained forty-five agents throughout the counties of the state, it gathered and filed valuable factual and medical information concerning its policyholders in the state, and it built up a large and profitable business which cannot be leased or sold to other persons (R. 4, 12).

On and for years prior to March 1, 1941, the Oklahoma statute applicable required a foreign insurance company doing business in the state to pay an "entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected" in the state "and an annual tax of three dollars on each local agent." Ch. 21, Art. I, Sec. 22, O. S. L. 1909; Sec. 10478, O. S. 1931 (Appendix I).

It is, and has been since 1909, the uniform administrative practice of the State Insurance Commissioner to require a foreign insurance company desiring, for the first time, to do business in Oklahoma to file an application for a license for a period to expire on the last day of the succeeding February. And on or before the expiration of this license period the foreign insurance company has been required, under the practice, to pay a tax on all

premiums, less proper deductions, received by it in Oklahoma after the date of its license and prior to the first day of the following January. The Commissioner has considered and treated this premiums tax as a tax paid by the foreign insurance company for the right or privilege of having entered the state during the calendar year preceding its payment and of having been permitted to do business in the state since its entry into the state and up to and including the end of the period covered by its license (R. 20, 21).

In case a foreign insurance company has been transacting business in Oklahoma pursuant to license prior to March 1 in some year and desires to continue in business for a subsequent license year, then in order to procure a license renewal the company, under this uniform administrative practice, is, and has been required, (a) to file on or before the last day of February of the expiring license year an application for a further license, and (b) to show that it has paid the tax on premiums collected during the preceding calendar year. At all times since 1909, in cases where license renewals are applied for, the Commissioner's uniform administrative interpretation has been that the tax on premiums received during the preceding calendar year is paid by the foreign company for the right or privilege of having been permitted to enter the state and of having done business therein during the license year expiring. The Commissioner considers that the annual license issued to foreign insurance companies

expires on the last day of February of each year (R. 21-22).

On March 1, 1941, petitioner received from the Insurance Commissioner of the state the usual renewal of its license which authorized it to conduct its business in Oklahoma during the license year which began on that date and was to extend until February 28, 1942 (R. 4, 11-12). One month and twenty-five days later, on April 25, 1941, the Oklahoma legislature passed, as an emergency measure an act effective immediately, which amended the previous statute relating to entrance fees and taxes imposed upon foreign insurance companies. Among other things the amendment levied an annual tax of 4 per cent on all premiums received by foreign insurance companies in the state and thus doubled the tax which had theretofore existed. Secs. 1 and 2, Ch. 1a., Tit. 36, pp. 121, 122, O. S. L. 1941; 36 O. S. 1941, Sec. 104 (Appendix II).

The administrative practices and interpretations with respect to the 4 per cent tax are the same as those applicable to the prior 2 per cent tax. The 4 per cent tax was levied and collected on all premiums received by foreign insurance companies in Oklahoma during the calendar year 1941 (R. 21, 22).

Obviously, when petitioner desired to procure a renewal of its license on March 1, 1942, the administrative practice required it to pay, and to show that it had paid, the 4 per cent tax levied by the act of April 25, 1941. In

order to comply with this requirement petitioner did, on February 28, 1942, pay to the Commissioner the sum of $8,189.32, which was an amount equal to 4 per cent of all premiums, less proper deductions, received by it in the state during the calendar year 1941. This payment was made to the Commissioner under the conditions and provisions of a written protest filed with the Commissioner at the time that payment was made (R. 7-10). In this protest petitioner insisted that the payment was being made involuntarily and under duress, and that the 4 per cent gross premiums tax act was unconstitutional in that the tax was a levy of an arbitrary and discriminatory tax upon petitioner after it had been duly admitted to the State of Oklahoma and had become a quasi citizen thereof, and, therefore, denied to petitioner the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States (R. 7-10).

The sum paid by petitioner has been held by respondent separate and apart from the general revenue fund of the State Treasury of Oklahoma and will not be deposited in that fund unless and until there is a final adjudication against petitioner (R. 20, 25).

Life, accident and health insurance companies, domestic in Oklahoma and competing in that state with petitioner, do not pay any kind or type of taxes to the state which are not also paid by petitioner, except that those domestic companies pay an annual income tax from which tax petitioner is exempt. However, payment of this in-

come tax by foreign companies would produce only approximately one-twentieth of the amount which is produced by the 4 per cent tax imposed by the act of April 25, 1941 (R. 20).

During the period from November 16, 1907, and ending December 31, 1941, the Oklahoma Insurance Department collected and received in receipts from the 2 per cent tax on gross premiums of foreign insurance companies and from the annual entrance and agents' fees paid by such companies a total of $25,585,107.34, while the expenses of the Department during that period aggregated $910,-107.34, or in other words, during that period the expenses were approximately 3.55 per cent of the total receipts. Since December 31, 1941, the expenses of the Department have been approximately only 2 per cent of the gross receipts of the Department (R. 20).

One month after it paid the tax, petitioner instituted this action and in its complaint averred, among other things, that it is threatened with deprivation of its property and investment in Oklahoma by the collection under duress by respondent of the taxes in question; that the April 25, 1941, statute is unconstitutional and contravenes the Fourteenth Amendment in that it attempts to impose this tax exclusively upon petitioner after it was duly admitted to the State of Oklahoma, but does not impose the tax on domestic insurance companies doing an identical type and kind of business in the state, and that the at-

tempted levy of an arbitrary and discriminatory tax upon petitioner while it was a person within Oklahoma and possessed of property, investment and business in the state, deprives petitioner of its rights under the Fourteenth Amendment (R. 5-6). The complaint also alleged that the Oklahoma laws provide no appeal from the action of respondent in collecting the tax involved (R. 6). In a supplement to the complaint petitioner averred that the tax act is not an entrance fee nor a regulatory measure enacted by virtue of the state's police power, but rather it is a revenue-producing measure, taxing the business of petitioner done during the year 1941 (R. 17, 18).

The answer asserts that the complaint fails to state a claim against respondent upon which relief can be granted, denies that petitioner is threatened with deprivation of its property by reason of the collection of the tax, and denies that the complete exemption of competing domestic life insurance companies from the premiums tax constitutes a violation of the Fourteenth Amendment (R. 11-13). Following a pre-trial conference, the case was tried upon a written stipulation of facts (R. 14-23). The district court made findings of facts which substantially followed the admitted allegations of the complaint and the stipulation of facts (R. 23-27). The trial court also made certain conclusions of law (R. 28-31).

Opinion of the Circuit Court of Appeals.

From an adverse judgment in the district court, petitioner took an appeal to the Circuit Court of Appeals for the Tenth Circuit where the judgment of the lower court was affirmed (R. 39-46).

By its opinion the Circuit Court of Appeals determined:

(1) That annual licenses issued to foreign insurance companies doing business in Oklahoma expire on the last day of February next after they are issued.

(2) That the 4 per cent gross premiums tax paid by petitioner on February 28, 1942, was a payment for the privilege of having been permitted to do business in Oklahoma during the license year expiring on that date and as a condition precedent to a license renewal for the ensuing year.

(3) That since petitioner was only admitted to do business in Oklahoma until February 28, 1942, the state had the constitutional power to increase the tax burden during the course of that license year, and could refuse to renew the license for the succeeding license year in the absence of a showing that the tax had previously been paid.

(4) That the decision of this Court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713, is distinguishable, the Court concluding that the state legislation did not violate the equal protection clause.

Petition for rehearing was denied on June 9, 1943, and on June 21, 1943, the mandate was issued to the

United States District Court (R. 47). The trial court issued an order, dated July 19, 1943, staying the filing of the mandate, a certified copy of which order was included as an appendix to the petition for writ of certiorari.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred in that:

(1) It failed to hold that the "entrance fee" prescribed by Oklahoma law was and is the only payment required of foreign insurance companies as a condition precedent to entry into the state.

(2) It held that payment of the arbitrary and discriminatory gross premiums tax is a condition precedent to the original or subsequent entry into the state by a foreign insurance company.

(3) It held that payment of the gross premiums tax may follow entrance of the foreign insurance company into the state and yet be a condition precedent to such entry.

(4) It failed to hold that the gross premiums tax is a tax levied as a general revenue-producing measure and is not a tax levied in exercise of the police powers of the state.

(5) It held that Oklahoma had power, despite the equal protection clause, to levy a grossly discriminatory tax upon a foreign insurance company's 1941 business, by an act adopted on a date in that year which came after the company already had been duly admitted to the state and had been duly authorized to transact the business for that year.

QUESTIONS PRESENTED

(1) Did the United States District Court for the Western District of Oklahoma have jurisdiction of this cause?

(2) Is the Oklahoma statute, effective April 25, 1941, unconstitutional because it denies to petitioner equal protection of the laws under the Fourteenth Amendment?

SUMMARY OF ARGUMENT

I.

The United States District Court had jurisdiction of this action.

(a) The action is not a suit against the State of Oklahoma by a citizen of another state within the meaning of the Eleventh Amendment.

(b) A diversity of citizenship exists and the matter in controversy exceeds the jurisdictional amount.

(c) Even if this were considered to be an action against the State of Oklahoma the state has waived its immunity to suit in respect of the matter here involved, not only in the state courts, but also in the Federal courts.

(d) This is a suit of a civil nature which arises under the Constitution of the United States and in which the matter in controversy exceeds the jurisdictional amount.

II.

In providing for a gross premiums tax the Oklahoma constitution does not stipulate a condition precedent to the entry of a foreign insurance company into the state.

III.

The gross premiums tax provided by the Act of 1941 is a general revenue-producing measure imposed under the taxing power of the state and is not a measure adopted in the exercise of its police powers.

IV.

On April 25, 1941, when the 4 per cent gross premiums statute was enacted, petitioner stood admitted to Oklahoma and on a level with all domestic companies of the same type within the state.

V

The gross premiums tax imposed by the Act of 1941 denied to petitioner the equal protection of the laws under the Fourteenth Amendment.

VI.

The gross premiums tax provided by the Act of 1941 was not a condition precedent to the re-entry of petitioner into the state on March 1, 1942.

ARGUMENT

I.

The United States District Court had jurisdiction of this action.

(a) The action is not a suit against the State of Oklahoma by a citizen of another state within the meaning of the Eleventh Amendment.

In its order granting the petition for a writ of certiorari, this Court requested counsel to discuss the right of petitioner to maintain its suit in a Federal court. (R. 48). The opinion of the Circuit Court of Appeals makes no reference to the point (R. 39-46). No point was made

in the defendant's answer that the Federal court did not have jurisdiction of either the person or of the subject-matter (R. 11-13).

The original complaint named the defendant to be "Jess G. Read, Insurance Commissioner for State of Oklahoma" (R. 3), and the summons was directed to "the above named defendant" (R. 10). It is petitioner's contention that the action sought no relief against the State of Oklahoma, and that had judgment gone "against the defendant" as prayed no relief would have been available against the state, and that no machinery of the state would have been set in motion calculated to restore the tax money to petitioner. Rather it would have been left to its remedy against Jess G. Read, whether as Insurance Commissioner or otherwise.

The case of *A. T. & S. F. Railway Company v. O'Connor*, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, seems to be almost identical with the present situation. There action was brought to recover taxes paid under protest, the plaintiff contending that the law under which the tax was levied was unconstitutional. The tax involved was a tax of two cents upon each $1,000.00 of the plaintiff's capital stock. It was imposed by the laws of Colorado, and plaintiff was a Kansas corporation, the greater part of whose business and property was outside the State of Colorado. After holding that the tax was of the kind previously held by this Court to be unconstitutional, Mr.

Justice Holmes, speaking for a unanimous court, said at page 287:

> "The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified when he received it that plaintiff disputed his right. If he had no right, as he had not, to collect the money, his doing so in the name of the state cannot protect him. *Erskine* v. *Van Arsdale*, 15 Wall. 75, 21 L. ed. 63. See *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money, as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum. Moreover, it would seem that the statute contemplated the course taken by the plaintiff, and provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax. For it provides by Sec. 6 that 'if it shall be determined in any action at law or in equity that any corporation has erroneously paid said tax to the Secretary of State,' upon the filing of a certified copy of the judgment the auditor may draw a warrant for the refunding of the tax, and the state treasurer may pay it. We must presume that a judgment in the present action would satisfy the law."

It is submitted that the above case is decisive or comes close to being decisive of the point for which it is cited. It is to be observed that it parallels the case at bar in that the disputed tax was collected by the Secretary of State and it remained in his possession, the tax was paid under protest and suit was brought to recover the amount

under a statute appearing to be similar to the Oklahoma statute, and pending the suit to recover the tax, the money remained an identified trust fund. And it is to be noted that although in order to refund to plaintiff the protested tax money it was necessary for the State Auditor to draw a warrant upon the State Treasurer and for the treasurer to pay out the funds, yet this Court held that the suit was not against the State of Colorado.

The early decision of *Osborn* v. *Bank of United States*, 22 U. S. 738, 9 Wheat. 738, 6 L. ed. 204, held that jurisdiction of Federal courts depends upon the parties to the record, and is not to be determined by seeking to ascertain if the state is the real party in interest. The Court concluded that it was proper to enter a decree against individuals who had taken tax money since the state law conflicted with the paramount authority of the Constitution of the United States, for the reason that the statute could furnish no authority to the individual for the taking.

In *U. S.* v. *Peters* 9 U. S. 115, 5 Cranch 115, 3 L. ed. 53, an action was brought against the state treasurer and the right to maintain the suit was upheld where the money held by the defendant had not been deposited in and commingled with state treasury funds.

Attention is directed to stipulation of fact No. 1 (R. 20), wherein it is agreed that the sum of $8,189.32 paid by petitioner under protest has been held separate and apart from the general revenue fund of the state treas-

ury of Oklahoma, as provided in Sec. 12665, O. S. 1931, and will not be deposited unless there is a final adjudication in favor of respondent.

Erskine v. Van Arsdale, Collector of Internal Revenue, 82 U. S. 75, 15 Wall. 75, 21 L. ed. 63, settled the right to recover taxes paid under protest to a collecting officer where the taxes were taken without authority of law.

In *Poindexter* v. *Greenhow, Treasurer*, 114 U. S 270, 29 L. ed. 185, involving the Virginia coupon questions, suit was brought by the taxpayer against the collecting official. The action was one of detinue to obtain a desk taken by the treasurer in default of payment of taxes, although there had been a tender of coupons therefor. One of the stipulations of fact was that defendant was acting in an official capacity. The law purporting to authorize his action being an unconstitutional impairment of contract, the suit was held not to be a suit against the state and it was said that the revenue of the state must yield to the paramount authority of the constitution. The basis of the decision is (page 288) that a defendant who seeks to justify his action by state authority is bound to establish such authority. Although the state is a political corporate body, which can act only through agents, the state officer must produce a law of the state which can serve as his authority as an agent. If the law which he presents is in conflict with the constitution, the constitution must prevail and is, instead, the law of the state. The defendant then stands stripped of his official character.

The present case seems within the exhaustive opinion of this Court in *Ex parte Young*, 209 U. S. 123, 160, 52 L. ed. 714, 729, 28 Sup. Ct. Rep. 441, wherein the foregoing rule is reiterated. This Court points out that both the Eleventh and Fourteenth Amendments to the Constitution exist in full force and must be given equal effect. Under the authority of this opinion and the many decisions following its announced doctrine, it is submitted that Oklahoma has no power to impart to respondent any immunity from responsibility to the supreme authority of the United States.

Illustrative and to the same effect are *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Scott* v. *Donald*, 165 U. S. 58, 41 L. ed. 648, 17 Sup. Ct. Rep. 262, and *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699 (the latter being a suit against Land Commissioners of a state).

A state law establishing railroad rates so low as to deprive the carrier of fair compensation violates the Fourteenth Amendment, and a suit to prevent enforcement of such an unconstitutional enactment is not a suit against the state. *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup Ct. Rep. 418.

Where Arkansas laws required a foreign telegraph company to pay a given amount based on all its capital stock merely for filing its articles of incorporation with the Secretary of State, an illegal burden on interstate busi-

ness resulted, as well as a tax on property beyond the jurisdiction of the state. The immunity of the state from suit was not violated by enjoining the Secretary of State from terminating the company's right to do business. *Ludwig* v. *Western Union Telegraph Company*, 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280, following *Western Union Telegraph Company* v. *Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286.

Petitioner submits that this Court should not base the right to constitutional protection upon a descriptive designation affixed to respondent by the taxpayer; the descriptive phrase cannot alter the unofficial character of respondent's action in collecting the tax and cannot change the effect of the judgment. Respondent is not sued "as" insurance commissioner (R. 3, 11), nor has the tax money been commingled with the general funds of the state. A repayment of the money will not deplete the general funds of the state. It would appear that it was the presence of such factors that led the court to hold the action in *Smith* v. *Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919, to be one against the state.

Respondent has not acted under an admittedly valid statute nor does the suit force him to take any discretionary action. Compare *Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164. Respondent has no discretion under the taxing act other than to collect the taxes levied and he has no discretion under Sec. 12665, O. S. 1931, to

do other than hold those taxes pending this judicial determination. The Court in the case at bar is asked neither to assume any of the executive authority of the state nor to supervise any conduct of persons charged with an official duty. It is submitted that this action is not, either in theory or in fact, an action against the State of Oklahoma.

(b) A diversity of citizenship exists and the matter in controversy exceeds the jurisdictional amount.

If this is not a suit against the State of Oklahoma, which petitioner earnestly contends it is not, then it is a suit against Jess G. Read, a citizen of that state. In that case the jurisdiction in the Federal court is apparent.

Paragraph 1 of the complaint (R. 3) alleges:

> "Plaintiff is a corporation incorporated under the laws of the State of Wisconsin, but having a permit to do business under the laws of the State of Oklahoma, and defendant is a citizen of the State of Oklahoma. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 (three thousand dollars)."

Numerical paragraph 5 of respondent's answer (R. 11) is as follows:

> "5. Defendant admits the allegations contained in paragraph 1 of the complaint."

The jurisdictional statements of the complaint follow the official forms prepared as an appendix to the Federal

Rules of Civil Procedure, 28 U. S. C. A., following Sec. 723(c). The allegations show the existence of a diversity of citizenship and it is unnecessary to specifically allege "that diversity of citienship exists." *Brown* v. *Keene*, 33 U. S. 112, 8 Pet. 112, 115, 8 L. ed. 885; *Watters* v. *Ralston Coal Co.*, 25 Fed. Sup. 387 (D. C., N. D., Penn. 1938).

The action having been brought to recover $8,189.32, the matter in controversy clearly exceeds the sum of $3,000.00. Under Sec. 24(1), Judicial Code (28 U. S. C. A., Sec. 41 [1]), the United States District Court had original jurisdiction of this suit of a civil nature because of the existing diversity of citizenship and the presence of the requisite jurisdictional amount.

(c) Even if this were considered to be an action against the State of Oklahoma the state has waived its immunity to suit in respect of the matter here involved, not only in the state courts, but also in the Federal courts.

If this Court rules that this is a suit against the State of Oklahoma, petitioner nevertheless contends that the Federal court has jurisdiction of this cause because the state has waived its immunity to suit in the Federal courts as well as in Oklahoma state courts in respect of the matter here involved, and the action presents a controversy arising under the Constitution of the United States, the amount of which is in excess of the jurisdictional amount. Obviously, if this Court rules that this

is not a suit against the state, the point here made becomes academic.

Section 12665, O. S. 1931 (Appendix IV), provides that in all cases where an illegal tax is involved and the laws provide no appeal, the taxpayer shall pay the full amount at the time and in the manner provided by law, and shall give notice to the collecting officer showing the grounds of complaint, and that suit will be brought. The taxes are held separate and apart, and if summons is served upon the collecting officer for recovery of the taxes within thirty days, he shall hold them until final determination of the suit. The foregoing statute was in force at the time the 4 per cent tax was imposed as of April 25, 1941. As of May 23, 1941, the legislature repealed this statute, but at the same time re-enacted the statute *verbatim* (68 O. S. 1941, Sec. 15.50).

Under the 1941 taxing act complained of, gross premiums taxes on petitioner's 1941 business were due on or before February 28, 1942. They were paid by petitioner on that date, accompanied by a formal protest (R. 7-10), served upon respondent and the State Treasurer. Summons was issued and served within thirty days. There was complete and literal compliance with the statute.

This permissive statute also provides that suits to recover taxes "shall be brought in the court having jurisdiction thereof." It further provides that "they shall have precedence therein," and if it shall be determined that the

taxes were illegally collected "the court shall render judgment showing the correct and legal amount of the taxes due by such person, and shall issue such order in accordance with the court's findings."

While respondent will not deny that this statute waives the state's immunity from suit, yet he no doubt will contend that the above quoted clauses prescribe procedural requirements for Oklahoma courts, but not for Federal courts where the Oklahoma legislature could have no authority. It will thus be asserted that the Oklahoma legislature did not intend to authorize the filing of actions in Federal courts.

This issue was resolved to the contrary almost fifty years ago by the memorable opinion in *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362, 391, 392, 38 L. ed 1014, 1021, 14 Sup. Ct. Rep. 1047, 42 Inters. Com. Rep. 560, decided May 26, 1894, by a unanimous court. The Texas legislature had created the Texas Railroad Commission. Section 6 of the statute (for the purpose of immediate comparison with the Oklahoma statute) was as follows:

> "Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, *in a court of competent jurisdiction in Travis County, Texas*, against said com-

mission as defendant. Said action *shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: Provided, That if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice*" (Italics supplied).

It was asserted that the provision that suits could be brought "in a court of competent jurisdiction in Travis County, Texas," excluded jurisdiction of Federal courts sitting in Travis County. The court said (page 392):

> "* * * The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language, differing from that which ordinarily would be used to describe a court of the state, was selected, apparently, in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts."

It may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own

courts. *Reagan* v. *Farmers' Loan and Trust Company, supra; Smyth* v. *Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418.

In the Reagan case this Court held not only that the language employed in the statute did not restrict the consent of the state to suit in its own courts, but also that irrespective of such consent, the suit was not in effect a suit against the state (although the attorney general was enjoined), and, therefore, not prohibited under the Eleventh Amendment (page 392). The conclusion of the court was that the objection to the jurisdiction of the Federal court was not tenable, whether that jurisdiction was rested (page 393) "upon the provisions of the statute, or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States." Each of these grounds is effective and both are of equal force. *Union P. R. Co.* v. *Mason City and Ft. D. R. Co.*, 199 U. S. 160, 166, 50 L. ed. 134, 137, 26 Sup. Ct. Rep. 19.

The Oklahoma statute does not require that the suit be brought in any particular court or in any particular locality, but merely that it be brought "in the court having jurisdiction thereof." The remaining statutory provisions, when compared with the restrictive clauses of Section 6 of the Texas statute construed in the Reagan case, show that this action is authorized in any Federal court otherwise having jurisdiction. It is contended,

therefore, that the state's waiver of immunity extends to the suit at bar.

(d) This is a suit of a civil nature which arises under the constitution of the United States and in which the matter in controversy exceeds the jurisdictional amount.

The Federal courts have jurisdiction of actions arising under the constitution irrespective of the citizenship of the parties litigant. 28 U. S. C. A., Sec. 41 (1). If the state is amenable to suit in the Federal court with respect to the matter here involved, that court may decide the controversy if it arises under the United States Constitution.

The complaint and the formal protest attached as an exhibit demonstrate that petitioner's right to the equal protection of the laws is an essential element of its cause of action. A genuine and present controversy exists as is shown from the face of the complaint, without anticipation of any claim or defense which might be alleged by the opposing party. Protection of the Fourteenth Amendment is invoked upon the ground that the tax was imposed upon petitioner after it had complied with all prerequisites to becoming a quasi citizen of the State of Oklahoma and at a time when it stood upon a level with directly competing domestic companies. The complaint asserts the imposition of a grossly discriminatory tax burden threatening deprivation of a unique type of business built up through a period of twenty years, and demon-

strates that the legislative enactment was an unauthorized exercise of the state's taxing power rather than a legitimate employment of the usual police powers resting in a sovereign state—powers primarily exerted for the protection of those citizens of the state who may deal with foreign companies.

This Court has settled the right to proceed in the Federal courts where cases arise under the Constitution through a long, unvarying line of opinions. In *Nashville* v. *Cooper*, 73 U. S. 247, 6 Wall. 247, 18 L. ed. 851, the court proclaimed the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals.

This Court's opinion in *Village of Norwood* v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, holds that under a state statute authorizing injunctions and under general principles as well, a Federal court has jurisdiction to enjoin the collection of taxes on private property being taken under the power of eminent domain for the reason that the taxing act violates due process and the case thus "arises under the Constitution of the United States."

In *Raymond, County Treasurer*, v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. ed. 78, 28 Sup. St. Rep. 7, the claim that the collection of a tax would violate the constitution was held to constitute a Federal question within the original jurisdiction of a Federal court. And in *Greene* v. *Louisville & I. R. Company*, 244 U. S. 499, 61

L. ed. 1280, 37 Sup Ct. Rep. 673, a state board of valuation and assessment, and its members individually, were enjoined from enforcing certain franchise taxes assertedly denying to plaintiff equal protection and due process. It was held both that the complaint presented a controversy arising under the Constitution of the United States and that the suit was not against the state within the meaning of the Eleventh Amendment.

A suit to enjoin the collection of special excise taxes imposed by a state statute upon railroads, which taxes are alleged to violate the due process clause and to burden interstate commerce is a "suit of a civil nature which arises under the Constitution of the United States." *Davis* v. *Wallace*, 257 U. S. 478, 66 L. ed. 325 42 Sup. Ct. Rep. 164.

The principle was followed and applied in *Keokuk & Hamilton Bridge Co.* v. *Salm*, 258 U. S. 122, 66 L. ed. 496, 42 Sup. Ct. Rep. 207, where the complaint alleged that the taxation involved was based upon discriminatory overvaluation of property, thereby denying equal protection and depriving plaintiff of property without due process. Although jurisdiction of the district court was confirmed, injunctive relief was denied because of the existence of an adequate remedy at law.

Mr. Justice Stone's opinion in *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 70 L. ed. 641, 46 Sup. Ct. Rep. 236, concluded that a contention that an assessment of

taxes upon lands beyond the taxing district deny to the owner due process and equal protection gives this Court jurisdiction.

Jurisdiction was upheld in *Hopkins* v. *Southern California Telephone Company*, 275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. Rep. 180, where an unconstitutionally discriminatory tax on leased telephones was involved.

Not all of the cases involving unconstitutional imposition of taxes have been of an equitable nature. In *Patton* v. *Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, this Court held that the case arose under the constitution where plaintiff had brought an action against the Collector of Internal Revenue to recover excise taxes on tobacco, previously paid under protest, and alleged that the act of Congress levying the taxes was unconstitutional.

Illinois Central Railway Company v. *Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251, illustrates application of the jurisdictional test to cases asserting the impairment of contract obligations. The railroad had been exempt from taxes for a period of twenty years under the terms of its charter. It sought to enjoin the Railroad Commission of Mississippi from approving and certifying tax assessments. Since the complaint alleged an impairment of a contract obligation and the claim was apparently being made in good faith, it was held that the case arose under the constitution. The court further determined that the Eleventh Amendment was no bar to the right to proceed in the Federal court.

And in *Jetton* v. *University of the South*, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375, where an injunction was sought against the collection of taxes on the ground of a contract exemption therefrom, this Court decided that, while there was actually no unconstitutional impairment, the averments of the bill were sufficient to establish jurisdiction of the Federal court.

Impairment of the contract clause of the constitution by municipal action involves the construction and application of the constitution, and such rights being asserted, the Federal courts have jurisdiction. *Pacific Electric Railway* v. *Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *City Railway Company* v. *Citizens' Street Railway Company*, 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

A remedy by injunction has been afforded by the Federal courts in numerous cases involving rates. See *Home Telephone and Telegraph Company* v. *Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. Upholding an injunction against the enforcement of a municipal ordinance setting telephone rates, the court pointed out that the provisions of the Fourteenth Amendment are generic in their terms and are addressed not only to the states, but as well to every person who is the repository of state power. Also, *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451, where the Kentucky Railroad Commission was enjoined, and *Columbus Railway, Power and Light Co.* v. *Columbus*, 249 U. S.

399, 63 L. ed. 669, 39 Sup Ct. Rep. 349, enjoining a city council.

Swafford v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, and *Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17, established jurisdiction on the ground that the cases arose under the constitution. There the actions were to recover damages for refusal of the plaintiff's vote or right to vote. It was contended, as does the respondent herein, that jurisdiction was lacking because the case did not involve the "construction or application of the constitution." Defendants asserted that, since the constitution did not specifically confer the right of suffrage, there was no problem of interpretation, construction or application of the provisions of our constitution. But this Court held that the actions sought vindication or protection of the right to vote, and that such right was in the very nature of things one arising under the constitution.

In the present case, respondent has invaded petitioner's constitutional guaranty of equal protection. Only the Constitution of the United States extends to petitioner this inviolate right, and without its protection petitioner would have neither cause of action nor remedy against an extreme disparity and discrimination in taxation.

Attention is directed to *Fidelity and Deposit Company* v. *Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 Sup. Ct. Rep. 331. There the New Mexico Corporation Commis-

sion attempted to exclude a foreign corporation from the state for violation of a statute demanding that insurance brokerage fees be paid only to New Mexico agents. This Court affirmed federal jurisdiction to enjoin the deprivation of constitutional rights.

A case may arise under the Constitution of the United States, vesting jurisdiction in the Federal court under the Judicial Code, though equitable relief may be still denied upon the ground that there is an adequate remedy at law. Such a remedy at law is available both in the state courts and in the Federal courts, since the courts of the United States would otherwise have jurisdiction. *Matthews* v. *Rodgers*, 284 U. S. 521, 76 L. ed. 447, 52 Sup. Ct. Rep. 217.

Perhaps the most elaborate opinion of this Court upon the jurisdiction of the courts of the United States in cases arising under the constitution, is *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. Rep. 441. There, as here, it was insisted that there was no federal question presented under the Fourteenth Amendment because there could be no dispute as to the meaning of the constitution in those clauses providing that no state shall deprive life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; that whatever dispute there might have been in the case was simply one of fact as to whether the freight or passenger rates, as fixed by the legislature or by the

railroad commission, were so low as to be confiscatory. It was decided that if such legislative acts and commission orders would take property without due process if enforced, then a federal question was presented, although a question of fact would be thereby presented.

Other cases in which Federal jurisdiction was upheld on the foregoing ground are the following:

City of Mitchell v. *Dakota Central Telephone*,
246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. Rep. 362;
Mayo v. *Lakeland Highlands Canning Co.*,
309 U. S. 310, 84 L. ed. 774, 60 Sup. Ct. Rep. 517;
Smith v. *Kansas City Title and Trust Company*,
255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243;
Clallam County v. *United States*,
263 U. S. 341, 68 L. ed. 328, 44 Sup. Ct. Rep. 121;
Herkness v. *Irion*,
278 U. S. 92, 73 L. ed. 198, 49 Sup. Ct. Rep. 40;
Central Kentucky Natural Gas Company v. *Railroad Commission*,
290 U. S. 264, 78 L. ed. 307, 54 Sup. Ct. Rep. 154.

Compare *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342, where it appears that this Court first determined that inequality in taxation may not be so systematic and intentional as to violate equal protection as applied to a domestic company, and, therefore, that jurisdiction may be lacking despite the allegations in the bill.

The question on the merits presented by the complaint herein is whether a state has power under the Constitution of the United States to levy a discriminatory tax for revenue purposes after petitioner's admission to the state.

The state's power in this regard must be limited, if at all, by the equal protection clause; and the restriction thereby placed upon the state's power can only be determined from the decisions of this Court. It is submitted, therefore, that this case arises under the constitution and that the district court had jurisdiction, irrespective of the citizenship of the parties.

II.

In providing for a gross premiums tax the Oklahoma Constitution does not stipulate a condition precedent to the entry of a foreign insurance company into the state.

Secs. 1, 2 and 3 of Art. XIX of the Constitution of Oklahoma, read as follows:

> "1. Foreign Insurance Companies—Conditions of Doing Business.
>
> "No foreign insurance company shall be granted a license or permitted to do business in this state until it shall have complied with the laws of the state, including the deposit of such collateral or indemnity for the protection of its patrons within this state as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.
>
> "2. Entrance Fees—Annual Tax.
>
> "Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the state, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the state, an entrance fee as follows:

"Each foreign life insurance company, per annum, two hundred dollars; each foreign fire insurance company, per annum, one hundred dollars; each foreign accident and health insurance company, jointly, per annum, one hundred dollars; each surety and bond company, per annum, one hundred and fifty dollars; each plate glass insurance company (not accident), per annum, twenty-five dollars; each foreign livestock insurance company, per annum, twenty-five dollars.

"*Until otherwise provided by law,* domestic companies excepted, each insurance company, including surety and bond companies, doing business in this state, shall pay an annual tax of two per centum on all premiums collected in the state, after all cancellations are deducted, and a tax of three dollars on each local agent.

"3. Non-Profit Insurance Organizations.

"The revenue and tax provisions of this constitution shall not include, but the state shall provide for, the following classes of insurance organizations not conducted for profit, and insuring only their own members:

"First, farm companies insuring farm property and products thereon; second, trades insurance companies insuring the property and interest of one line of business; third, fraternal life, health and accident insurance in fraternal and civic orders, and in all of which the interests of the members of each respectively shall be uniform and mutual."

Taken by and large, the above three sections of the Oklahoma Constitution purport on their face to deal with, first, the admission into the state of foreign insurance companies, and, second, to taxes to be imposed upon those companies after their admission. It remains to distinguish between these two features of the sections in question.

It seems fair to observe that Section 1, and the first two paragraphs of Section 2 purport to deal with the admission of foreign companies into the state, whereas the third paragraph of Section 2 relates to taxes to be imposed upon these companies after admission and while "doing business" in the state. Section 3 provides that the "revenue and tax provisions" of the constitution shall not apply to insurance organizations not conducted for profit and insuring only their own members, such as insurance of farm property, fraternal insurance, etc. Having just prescribed a tax of 2 per cent on foreign insurance companies, Section 3 follows and consistently refers to the 2 per cent tax provision as one of the "revenue and tax provisions" of the constitution. The third paragraph of Section 2 drives the tax nail and Section 3 proceeds to clinch the point.

As conditions of admission to the state, Section 1 requires the applying foreign company to show that it has complied with the laws of the state with respect to foreign insurance companies, to deposit such collateral for the protection of its patrons within the state as may be prescribed by law and to agree to pay all such taxes and fees as may at any time be imposed by law on foreign insurance companies. In addition to these conditions of admission the first two paragraps of Section 2 provide that applying foreign insurance companies shall pay to the Insurance Commissioner for the use of the state "an entrance fee," which in the case of life insurance companies is stated to

be $200.00 and in the case of accident and health insurance companies the sum of $100.00, or a total of $300.00 for a foreign company engaged as is petitioner, in the business of life, accident and health insurance. The foregoing are in character true conditions precedent to admission to the state. Up to this point a clear statement is found of the requirements which must be met by a foreign company desiring admission. On the face of the language used, a company meeting these requirements will receive a license authorizing it to do business in the state.

Having disposed of these conditions, including the "entrance fee," to the issuance of a license, the third paragraph of Section 2 passes to the question of the tax burden which the foreign corporation "doing business" in the state shall be required to assume after admission. This tax burden is stated to be "an annual tax of two per centum on all premiums collected in the state, * * * and a tax of three dollars on each local agent." Obviously, this annual tax cannot be paid before the foreign company is admitted into the state and its payment cannot be a condition precedent to admission to the state. It necessarily is an item which can only be paid after the calendar year in which the company entered the state has ended. Only at the end of this calendar year will the foreign company be able to ascertain the amount of premiums collected in the state during the year of admission and then to compute the amount of the annual tax required to be paid.

Collection of this tax at the end of the year may be both a convenient and a logical method of collection, but the method of imposition and collection labels the imposition as a tax dissociated with the admission of the taxpayer into the state. The procedure is to admit the foreign company and then to tax it. If that law provided that a foreign company desiring admission or re-admission into the state should pay as a condition of entrance 2 per cent of the premiums received in the preceding calendar year in the state (as do the laws of some states—see 1943 Illinois Revised Statutes, Ch. 73, Sections 1021-1025), a different situation would be presented. But that is not the procedure in Oklahoma since admittedly the premiums tax is not paid prior to or at the time of admission. Petitioner submits that no construction of the language used in the Oklahoma constitution or of any enactment in accordance therewith, holding payment of this tax to be a condition precedent to admission when it is not due or payable until one year after admission, is possible without doing violence to the usual rules of construction applicable in such cases.

III.

The gross premiums tax provided by the Act of 1941 is a general revenue-producing measure imposed under the taxing power of the state and it is not a measure adopted in the exercise of its police powers.

It is the contention of petitioner that the enactment of the Oklahoma legislature of April 25, 1941, was, and is, a taxing measure calculated to raise revenue for state purposes in the usual manner of revenue-producing measures. Agreeable to the introductory clause of the third paragraph of Section 2 which provides that the 2 per cent tax shall exist "until otherwise provided by law" the legislature proceeded to the enactment of April, 1941 (Appendix II). While, with this thread of kinship, the legislative act may be traced to the constitution, yet the act itself seems to go as far as possible to divorce itself from this relationship. The act bristles with indicia of the customary revenue-producing measure. It proclaims almost vehemently that its purpose is to raise revenue for general state purposes. It evidences no intent to bottom the measure upon an exercise of the police powers of the state.

In the title it is stated that the act is one "providing for an annual tax of four per cent (4%) on all premiums collected in this state * * * to be paid by all foreign insurance companies doing business in the State of Oklahoma." The act extends the provisions of the statute to include "every foreign corporation, * * * who is a nonresident of the State of Oklahoma, doing an insurance business of any nature whatsoever." The act provides for the "distribution and appropriation of such taxes." An emergency is declared.

The title to the act in no manner refers to an "entrance fee" or otherwise indicates that it is calculated to prescribe one or more conditions precedent to be met by foreign insurance companies desiring to enter the state. Only a gross premiums tax is indicated by the title and it is fair to say that by reading the title of this act no one could discover or would surmise that it had any relation to or bearing upon the question of the entry into the state of a foreign insurance company.

The procedure specified in this act and the taxing provisions found in the body of the act, characterize it as anything but legislation dealing with conditions precedent to entry into the state. It requires every foreign insurance company "doing business in the State of Oklahoma" to make an annual report on or before the last day of February, under oath of the president or secretary or other chief officer, to the Insurance Commissioner, which report shall show the total amount of gross premiums received in the state within the calendar year next preceding the first of January. This provision is inconsistent with legislation calculated to refer to foreign insurance companies desiring to enter the state. On the contrary, it assumes that the companies who are to make this report are those already in the state and those who, as the act states, are "doing business" in the state.

At the time this report is made the act requires the foreign company to pay to the Insurance Commissioner

"an entrance fee" as provided by the constitution "and an annual tax of four per cent (4%) on all premiums collected" in the state "in addition to an annual tax of three dollars ($3.00) on each agent." The law thus segregates the entrance fee from the tax levied.

The act further provides that any company failing to make these returns and to pay promptly the items required "shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00)." It further provides that the company failing or neglecting for sixty days to make the report and pay the taxes shall "be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

To be consistent in its taxing nature, the act then proceeds to provide that the Insurance Commissioner shall disburse the taxes collected by him under the act so that 50 per cent of the tax on all fire insurance company premiums shall be allocated for the Firemens' Relief and Pension Fund and the remainder of the 4 per cent tax shall be paid to the State Treasury to the credit of the general fund of the state.

The mere statement of the foregoing provisions seems persuasive of the proposition that the legislation is re-

moved from the category of legislation calculated to govern the admission of the foreign company into the state.

The title of this 1941 act states that it is an act amending Section 10478, which was the prior act by which the 2 per cent tax was provided in much the same manner. The Oklahoma Supreme Court has not yet determined whether or not the premiums tax in question is an entrance fee levied under the state's police power. However, that court was called upon to decide whether the provision "shall be in lieu of all other taxes and fees" found in both acts, exempted foreign companies from the payment of ad valorem taxes. *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936. Constitutionality of the 2% gross premiums tax was not involved in that case. There was no interpretation of the statute for the purpose of deciding if the tax is an additional entrance fee, and the court did not determine whether the tax had any of the characteristics of a condition precedent. The Oklahoma court decided that the 2 per cent tax was an excise or privilege tax and that the "in lieu" provision meant that such tax is to be paid "in lieu of all other (*excise*) taxes."

While a Federal court is bound by the denomination of the tax placed thereon by the highest court of the state, yet it is not bound by any characterization thereof insofar as that characterization may bear upon the question of the effect of the tax under the Federal Constitution. *Hanover*

Fire Insurance Company v. *Harding* (Hanover Fire Insurance Company v. Carr), 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713.

IV.

On April 25, 1941, when the 4 per cent gross premiums statute was enacted, petitioner stood admitted to Oklahoma and on a level with all domestic companies of the same type within the state.

Petitioner had received on or prior to March 1, 1941, its license to transact business in the state for a period to end March 1, 1942. Prior to the issuance of this license it had paid the "entrance fee" of $300.00 and had paid 2 per cent of the gross premiums received by it in the state during the calendar year 1940. Thus, petitioner was fully domesticated in the state, at least for the license year beginning March 1, 1941. It was a "person" within the jurisdiction of the State of Oklahoma (R. 4, 11-12). It was a quasi citizen of the state. It stood on a level plane with domestic corporations of the same kind and was entitled to privileges equal to those due to other similar citizens of the state. *Hanover Fire Insurance Company* v. *Harding, supra.*

Notwithstanding this status in the state which petitioner had paid for and was entitled to enjoy, the Oklahoma legislature in less than two months after that status had been acquired, enacted the 4 per cent tax complained of, which became effective as an emergency enactment on

April 25, 1941. By its terms, a tax levy of 4 per cent was laid upon the gross premiums which petitioner had theretofore received within the state since the first of that year and which it would receive within the state up to the end of that year. The act was rigidly directed at gross premiums for 1941 as well as for subsequent years. The Insurance Commissioner considered it a levy on 1941 premiums, and rightly so (R. 21). Petitioner submits that this enactment of 1941 denied to it equal protection of the laws to which it was entitled under the Fourteenth Amendment.

V.

The gross premiums tax imposed by the Act of 1941 denied to petitioner the equal protection of the laws under the Fourteenth Amendment.

It is fundamental that a sovereign state has the constitutional power to close its boundaries to all foreign insurance corporations if it so desires and that such exclusion may be for an entirely arbitrary reason. If, however, it desires to admit them it may, in the exercise of its police power, impose certain conditions upon the privilege thus granted, the only limitation upon such conditions being that they may not include or require a waiver or surrender of rights secured to foreign corporations by the Constitution of the United States.

In requiring the deposit of collateral or indemnity for the protection of insurance patrons within the state as a prerequisite to the issuance of a license, Sec. 1 of Art. XIX of the Oklahoma Constitution, appears to be a legitimate exercise of the state's police power. Its object is to guard those Oklahoma residents who may purchase policies of insurance from foreign companies and to assure the payment of their subsequent claims. Since they are not dealing with locally established concerns, this is a matter which is important to the welfare of the people of the state. But exercise of the police power is the raising of a shield for the policyholders and it may not be exercised as an excuse for economic discrimination between domestic companies and foreign companies providing the same services and doing an identical type of business. The "taxes or fees" which petitioner was required by the Oklahoma Constitution to "agree to pay" on pain of suffering a "forfeiture" of its license, must be considered as limited to those taxes or fees which are not repugnant to the Constitution of the United States. *Hanover Fire Insurance Company* v. *Harding* (Hanover Fire Insurance Company v. Carr), 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713, and cases therein cited. *Connecticut General Life Insurance Company* v. *Johnson*, 303 U. S. 77, 79, 80, 82 L. ed. 673, 677, 58 Sup. Ct. Rep. 436.

It is conceded that if the 4 per cent tax law were a measure adopted in exercise of the state's power to police

its borders and if it set up machinery for taking a toll at those borders from those desiring to cross, then that law would stand the test of constitutionality. But it is submitted that the law in question is not that kind of law.

Whether the tax be designated as a "privilege tax," a "franchise tax," an "occupation tax" or some other kind of tax is of no moment in determining whether it is a payment required under the police power of the state as a condition of entry into the state. Rather, the important inquiry is to be directed to the time when the tax is to be paid with relation to the entry of the foreign company into the state. As was said by Mr. Justice Brandeis in *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22, 32, 82 L. ed. 24, 31, 58 Sup. Ct. Rep. 75, "The exaction, although called in some of those cases a filing fee, was in each case strictly a tax; for it was imposed after the admittance of the corporation into the state."

Certainly no form of compliance with the 1941 act was a condition upon which petitioner was "admitted" to do business in 1941, even assuming that a foreign insurance company possessed of a valuable and irreplaceable business built up through a period of twenty years, is theoretically "within the state" only from year to year. In *Hanover Fire Insurance Company* v. *Harding* (Hanover Fire Insurance Company v. Carr), 272 U. S. 494, 509, 71 L. ed 372, 380, 47 Sup. Ct. Rep. 179, Mr. Chief Justice Taft, speaking for the entire court, said:

"* * * In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that *pending the period of business permitted* by the state, the state must not enforce against its licensees unconstitutional burdens"

And at page 515:

"* * * the decision in *Southern R. Company* v. *Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business is not unlimited, and that any attempt in a renewal to vary the terms of the *original* license which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its federal constitutional rights, can not be effective" (Italics supplied).

It was necessary to determine that the Illinois net receipts tax involved in the foregoing controlling opinion was not a condition precedent. This Court did not attempt to justify the tax upon the basis that, as a privilege tax, its payment may either precede or follow exercise of the privilege. The opinion negatives such a nebulous rationalization.

Prior to the Hanover decision, the Illinois Supreme Court had held that the Illinois net receipts tax was a tax on the business of insurance and that it was not a tax on personal property, which was subject to debasement. *People ex rel. City of Chicago* v. *Barrett*, 309 Ill. 53, 139 N. E. 903. Then the Illinois court ruled that, regardless of what it might be called, the net receipts tax was a tax

on the right to continue to do business in the state, and that it did not deny equal protection of the laws under the Fourteenth Amendment. The court remarked that this tax on the business of insurance was not to be distinguished from a privilege tax and the fact that a tax is a privilege tax does not necessarily require it to be paid as a condition precedent to entering the state. *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, 148 N. E. 23. Upon writ of error to review this decree, this Court held that compliance with the net receipts taxing act was not a condition precedent to permission to do business in Illinois and was, therefore, an unconstitutional exercise of the state's taxing power. This Court demonstrated the impossibility of converting the tax to a condition precedent since it was necessary for the company to engage in business in the state prior to the time of payment of the tax; otherwise it would be impossible to compute the tax (page 512).

The opinion below, *Great Northern Life Insurance Company* v. *Read*, 136 Fed. (2d) 44, 47, seems predicated upon a determination that while petitioner was licensed from March 1, 1941, to February 28, 1942, yet it was within the power of the state to change the "condition of admission" as to the succeeding license year. At the same time, the court concedes that the tax is not imposed upon the future license year, but upon business done during the expiring license year. This confesses that petitioner had

been admitted to Oklahoma and placed upon an equal basis with competing domestic corporations, not only prior to the time for payment of the tax, but actually before the tax was levied.

Respondent may rely upon *Carpenter* v. *People's Mutual Life Insurance Company*, 10 Cal. (2d) 299, 74 Pac. (2d) 508, and *Pacific Mutual Life Ins. Co.* v. *Hobbs*, 152 Kan. 230, 103 Pac. (2d) 854, for the contention that payment may either precede or follow the exercise of the privilege, depending upon which system the legislature chooses to adopt. In the former of these cases, the company was not doing business in the state when the tax accrued because of a previous court order for liquidation. To hold it liable for payment of the tax, the California court was required to determine that the tax was paid for the previous year and not for the future or ensuing license year; the court did not hold that the tax was a condition precedent to a license renewal for the ensuing year since the company was not seeking to renew its license. In the Kansas case, the court recognized that the tax was not a prospective privilege tax, but was paid for the preceding year by saying that "to hold otherwise would permit a foreign company coming into the state for the first time to be exempt from taxation on the business done in the first year, if it withdrew at the end of the first year." Petitioner agrees that the tax paid at the end of the 1941 license year was a tax upon its 1941 business. Had petitioner withdrawn from the state at that time it still would

have been liable for the tax, since the doubled assessment was not a condition precedent to a license renewal for 1942.

The 4 per cent tax was directed only at foreign companies and did not apply to domestic companies doing a business identical to that being done by petitioner and with whom petitioner stood on a par at the time of the enactment. Petitioner contends that the levy on its premiums is arbitrary and discriminatory and that the act denies to petitioner equal protection of the laws. The power to tax in the usual sense is limited by the requirements of uniformity upon the same class of subjects and the demands of the equal protection clause.

It was stipulated that from November 16, 1907 (prior to the effective date of the 1909 General Insurance Act of Oklahoma, Chapter 21, O. S. L. 1909), to December 31, 1941, the Oklahoma Insurance Department received $25,585,107.34, almost all of which was derived from the 2 per cent tax on gross premiums. Departmental expenses aggregated $910,107.34; they were approximately 3.55 per cent of the total receipts (R. 20). Since doubling of the tax, those departmental expenses are approximately 2 per cent of the gross receipts. In other words, the cost of regulating and policing foreign companies for the benefit of Oklahoma citizens and policyholders is so disproportionate to the amount collected that the tax is obviously one for revenue purposes.

Validity of a tax must be tested by applicable constitutional requirements of reasonable classification if discrimination is permitted. By whatever name the tax may be called, it unconstitutionally discriminates against foreign insurance companies firmly establish in Oklahoma.

Following the decision of this Court in the Hanover case, the Illinois court once again returned to its original view that the tax therein involved was a property tax and if debased as was other property, would be constitutional. In *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, 545, 78 L. ed. 1411, 1418, 54 Sup. Ct. Rep. 830, this Court pointed out that it is completely immaterial what the tax may be called, saying:

> "* * * No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover Fire Insurance Co.* v. *Harding* (Hanover F. Ins. Co. v. Carr), 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713."

However, the record in the Concordia case showed that domestic corporations were subject to some taxes not laid upon foreign corporations, and plaintiff failed to show that such taxes were not the substantial equivalent of the net receipts tax. Recovery was denied by reason of the failure of proof.

There was no such failure in the present case. Stipulation of fact No. 2 (R. 20) is as follows:

"That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or type of taxes to said state which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately 1/20th of the amount of 4 per cent tax would bring on the premiums collected by said companies in this state, less proper deductions."

The record discloses that the only tax not applied to foreign corporations, but paid by domestic corporations, is not the substantial equivalent of the gross premiums tax. Certainly, mathematical equivalence is neither required nor obtainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens. Here there is an enormous disparity in the relative burdens shouldered by domestic and foreign insurance companies.

Tax laws made to apply after a foreign corporation has been received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment. *Hanover Fire Insurance Company* v. *Harding, supra.*

When a foreign corporation has entered a taxing state in compliance with its laws and acquired therein property of a fixed and permanent nature upon which it has paid all taxes levied by the state, it is not liable for a new and additional franchise tax for the privilege of doing

business within the state if that tax is not imposed upon competing domestic corporations. *Southern Railway Company* v. *Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287. To the same effect is *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346, 348, 67 L. ed. 297, 298, 43 Sup. Ct. Rep. 125.

Doubling the annual license fee paid by foreign corporations in Oklahoma, when an increase in tax payment is not required of competing domestic corporations, has been held in contravention of the Fourteenth Amendment. *Sneed* v. *Shaffer Oil & Refining Company*, 35 Fed. (2d) 21. Oklahoma has not provided for an entrance or admission fee, but has levied a tax. It has not attempted to make any classification between corporations doing different types of business for the purpose of imposing a different rate of taxation upon foreign insurance companies; in fact, all foreign companies are required to pay the tax while domestic companies pay none whatever. Nor are domestic companies required to share a substantial portion of the tax burden by the imposition of other and different taxes. The one taxpayer class is composed of foreign companies; the exempted class is made up of domestic companies.

A classification for tax purposes, in order to avoid violation of the equal protection clause, must be based upon a real and substantial distinction bearing a reasonable and just relation to the purpose to be accomplished.

Air-Way Electric Appliance Corporation v. *Day*, 266 U. S. 71, 69 L. ed. 169, 45 Sup. Ct. Rep. 12;

Southern Railway Company v. *Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287;

Royster Guano Company v. *Virginia*, 253 U. S. 412, 64 L. ed. 989, 40 Sup. Ct. Rep. 560;

Hopkins v. *Southern California Telephone Co.*, 275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. Rep. 180;

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. Rep. 553;

Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239, 76 L. ed. 265, 52 Sup. Ct. Rep. 133.

Since the gross premiums tax involved herein cannot be upheld as an exercise of the police power and since there is no attempt at reasonable classification to support it as an exertion of the state's power to tax, it must be held to be in violation of the equal protection clause of the Constitution.

VI.

The gross premiums tax provided by the Act of 1941 was not a condition precedent to the re-entry of petitioner into the state on March 1, 1942.

In accordance with the statute applicable on or prior to February 28, 1941, petitioner, desiring to continue business in the State of Oklahoma, filed the annual statements

required by law (Appendix III). At the same time petitioner paid the fee of $300.00, being the aggregate amount demanded by respondent as the "entrance fee" for renewal of its license. As we have seen, the Insurance Commissioner, as a matter of administrative practice, has at all times considered that the 2 per cent tax was a tax paid by a foreign insurance company for the privilege of having done business during the expiring license year and that payment must be shown prior to a renewal. Agreeable to this interpretation, the Commissioner demanded that in addition to payment of the entrance fee petitioner should also pay 4 per cent of the premiums received by it in the state for the calendar year 1941, and thus, no doubt, in addition to following the administrative practice, the Commissioner also had in mind that by requiring petitioner to pay this premiums tax he was also seeing to it that petitioner met the requirements of Section 1 of the Constitution and paid taxes "imposed by law or act of the legislature on foreign insurance companies." This tax payment was made under protest. Every prerequisite having been complied with by the petitioner, although the tax payment was made under protest, the Commissioner issued the license as of March 1, 1942. Although petitioner's tax burden had been doubled after its admission in 1941, it is reasonable to assert that in view of the property which over a period of upwards of twenty years it had laboriously built up in the state, it saw fit to pay under protest and to take out a further license on March 1, 1942.

For the sake of argument only, petitioner admits that it is "within the State of Oklahoma" only from year to year. This is a great sacrifice of substance to form. It embraces a very technical and highly artificial theory contrary in every respect to realistic fact. Petitioner has actually done business in Oklahoma for more than twenty years; through those years it has secured renewals of its license and built up a large goodwill in the State of Oklahoma, associating with it numerous agents in the various counties of the state, whose connection with it have resulted in a large and profitable business to petitioner. Its records of information concerning its policyholders, the character and nature of their policies and other invaluable assets are irreplaceable. They are not subject to sale or lease, and the value of all would be destroyed if Oklahoma were permitted to exclude petitioner from the state by a denial of the equal protection of the laws. Thus to portray the company as a traveler crossing and re-crossing the state's boundary at the expiration of each twelve months is the height of legal fantasy.

Assuming that such were the fact, and that the visited state could at any time increase the premiums tax to 10 per cent or 50 per cent under the guise of an exercise of its police power, leaving to domestic companies a complete exemption, the state could effectively and completely confiscate every asset possessed by petitioner.

Yet, if it be assumed that petitioner is within the state only from year to year, the question as to whether

the gross premiums tax is a condition precedent to the license year commencing March 1, 1942, still remains partly unanswered. It has heretofore been demonstrated that the tax cannot perform this function; it was not a condition precedent to the 1941 license year. Can the respondent require a showing of past compliance with the 1941 law as a condition precedent to renewal of the company's license for the year 1942?

The Illinois Supreme Court answered this question in the affirmative in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, 374, 148 N. E. 23, by applying the fallacious reasoning that, since the company was required to show that it had complied with the law requiring payment of the tax before a renewal would be granted, this showing was a valid condition precedent. The Supreme Court of the United States denied the state's right to avoid the equal protection clause by simply providing that failure to comply with the state laws at the end of the period for which the license runs justified a refusal to grant a new license. Petitioner cannot hope to properly paraphrase the following language of this Court (page 514):

> "* * * Of course at the end of the year for which the license has been granted, the state may in its discretion impose as condition precedent for a renewed license past compliance with its *valid* laws; but that does not enable the state to make past compliance with Section 30 a condition precedent to a renewal of the license, if as we find that section violates the Fourteenth Amendment, for, as already said, while a state may forbid a foreign corporation to do business within its jurisdiction or to continue it, it may not do so

by imposing on a corporation a sacrifice of its constitutional rights * * *" (Italics supplied).

Petitioner is not asking that the state surrender or abridge its power to change and revise its taxing system and tax rates, but it does insist that this tax denies to it the equal protection of state laws, the benefit of which inured to the petitioner as a quasi domestic citizen of Oklahoma on March 1, 1941. The state is not deprived of a source of revenue by invalidation of the taxing act, but merely will be required to effectuate substantial equality if it desires to continue collecting taxes on gross premiums. The 1941 act was unconstitutionally discriminatory at its inception and it continues to be. The state may not enforce compliance with a statute that is repugnant to the Federal Constitution.

CONCLUSION

Petitioner asks reversal of the judgment below.

Respectfully submitted,

CHARLES R. HOLTON,
HERBERT R. TEWS,
HENRY S. GRIFFING,
JOHN A. JOHNSON,
Counsel for Petitioner.

December, 1943.

APPENDIX I

Ch. 21, Art. I, Sec. 22, Oklahoma Session Laws 1909; Sec. 10478, O. S. 1931.

"Every foreign insurance company doing business in this state under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this state within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the Insurance Commissioner an entrance fee as provided by Article 19 of the Constitution of the State of Oklahoma, and an annual tax of 2 per centum on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said Insurance Commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision of municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting

for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

APPENDIX II

Sections 1 and 2, Chapter Ia, Title 36, pages 121 and 122, Oklahoma Session Laws 1941; 36 O. S. 1941, Sec. 104.

HOUSE BILL No. 353

AN ACT amending Section 10478 and Section 10479, Oklahoma Statutes 1931; providing for an annual tax of four per cent (4%) on all premiums collected in this state, with certain deductions to be paid by all foreign insurance companies doing business in the State of Oklahoma; extending the provisions of such statute to include every foreign corporation, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing an insurance business of any nature whatsoever; and providing for the distribution and appropriation of such taxes; and declaring an emergency.

"*Be It Enacted by the People of the State of Oklahoma*:

"Reports—Gross Premiums.

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be, and is, hereby amended to read as follows:

" 'Every foreign insurance company, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business

in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this state within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to

the agent or agents of that company to transact business in this state.'.

"Report and Disbursement.

"Section 2. That Section 10479, Oklahoma Statutes 1931, be, and is, hereby amended to read as follows:

" 'The Insurance Commission shall report and disburse all taxes collected under Section 1 hereof and the same are hereby appropriated as follows, to-wit:

" '(a) One-half or fifty (50%) per cent of the four (4%) per cent collected on all premiums by fire insurance companies in this state, shall be allocated and disbursed for the firemen's relief and pension fund as provided for in Sections 6110, 6111, 6112 and 6113 of the Oklahoma Statutes 1931.

" '(b) All the balance and remainder of the annual tax of four (4%) per cent provided for in Section 1 hereof shall be paid to the State Treasurer to the credit of General Fund of the State.

" 'The Insurance Commissioner shall keep an accurate record of all such funds and make an itemized statement and furnish same to the State Auditor, as do all other departments of this state. The report shall be accompanied by an affidavit of the Insurance Commissioner or the chief clerk of his office certifying to the correctness thereof. Provided that nothing herein shall be construed as repealing or affecting the provisions of Section 3744 of the Oklahoma Statutes 1931.' "

Approved April 25, 1941. Emergency.

APPENDIX III

Chapter 21, Art. I, Sec. 21, Oklahoma Session Laws 1909; 36 O. S. 1941, Sec. 56.

"Sec. 56. Annual Statement by Companies—Annual License.

"The Insurance Commissioner shall, in December of each year furnish to each of the insurance companies authorized to do business under the provisions of this article, two or more blanks in form adapted for their annual statement, and such companies shall, annually, on or before the last day of February, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year and its business of that year. For good cause shown, the Commissioner may extend the time within which such statement may be filed. Every such annual statement shall be in the form and of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this state. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this state, specifying in said certificate the par-

ticular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue. The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business."

APPENDIX IV

Section 12665, O. S. 1931.

"Illegality for which no appeal provided—Payment—Notice of complaint—Suits for recovery.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction

thereof, and they shall have precedence therein. If, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."